

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MARCH 16, 1994

OFFICE OF
MANAGING DIRECTOR

Vincent J. Curtis, Jr., Esq.
Anne Goodwin Crump, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209

92-277

Dear Mr. Curtis and Ms. Crump:

This is in response to your request for refund of a rulemaking fee submitted on behalf of CarePhil Communications (CarePhil), licensee of Station KKBI(FM), Broken Bow, Oklahoma, in connection with its application to upgrade the station's authorization back to Class C2.

You explain that the former licensee to Station KKBI obtained a construction permit to upgrade from Class A to Class C2, but difficulties in securing a transmitter site forced him to file for an automatic downgrade to Class C3. Subsequently, CarePhil acquired the station and applied for an extension on the C2 permit. One and a half years later, CarePhil simultaneously was granted the C3 permit and the C2 permit extension. At or about the same time, however, CarePhil found that it was able to work out the longstanding difficulties in securing the site specified in its C2 permit, and thus sought to abandon its plans to downgrade to C3 in favor of constructing in accordance with the terms in its C2 application. CarePhil informed the Commission by letter of its intentions, but was unable to do so until four days after the 30 day period for filing petitions for reconsideration.

CarePhil later applied for an extension of the C2 permit only, having notified the Commission by letter that it wished to abandon its plans to downgrade. The extension was granted and it bore the C2 permit file number. You state, however, that when CarePhil applied for a license to cover its C2 permit, a question arose as to whether CarePhil should submit a new petition for rulemaking to return the allotment to C2 status, since more than 30 days had elapsed from the time the downgrade to C3 was granted to the time CarePhil notified the Commission that it did not want to pursue the downgrade. CarePhil filed a petition for rulemaking, no party other than CarePhil filed comments, and the Report and Order restored the C2 allotment to Broken Bow. However, the Report and Order also specified that CarePhil should submit a minor change application for the construction permit. CarePhil's counsel contacted the Commission's staff and was informed that this was not necessary and that CarePhil should submit a letter requesting that its pending license application be processed. CarePhil submitted this letter and on September 3, 1993, was informed by letter from the Chief, FM Branch, that it was required to submit an application for a construction permit to upgrade and to submit the appropriate application and rulemaking fees.

You now request that the rulemaking fee be waived on the grounds that CarePhil was not advised that it had to pay such a fee until the September 3 letter from the FM Branch; that the Commission's grant of the C2 extension applications led CarePhil to believe that the C2 allotment was still viable; that filing the new rulemaking was merely a formality; that

Mr. Curtis and Ms. Crump.

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few regulatory costs were expended because no comments other than CarePhil's were filed; and that if CarePhil, though forced to try to extract itself from this procedural tangle, had instead filed an upgrade using the Commission's "one-step" procedure clarified in Public Notice, Mimeo No. 34706, released August 31, 1993, it would now only have to pay the filing fee charged for minor change applications.

Upon consideration of your request, mindful of the unusual procedural nature of this case, we conclude that a waiver of the rulemaking fee may be granted. In particular, we are persuaded that CarePhil did not learn that it was required to go through a rulemaking until it had completed construction of its C2 proposal, and did not learn that a fee was required for that rulemaking until some time later. Also, it appears that in this case, that rulemaking required the expenditure of few regulatory resources, and, if filed today, would be able to qualify for the one-step filing procedure requiring only the minor change application fee. In short, we do not believe that the public interest will be served in this case by requiring CarePhil to submit a rulemaking fee to restore the C2 allotment to Broken Bow, Oklahoma. However, CarePhil still must submit a minor change application along with the appropriate fee.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Dennis Williams, Chief, FM Branch
Audio Services Division

COPY

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October 13, 1993

RECEIVED

OCT 13 1993

Andrew S. Fischel
Managing Director
Federal Communications Commission
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Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: KKBI (FM)
Broken Bow, Oklahoma
File No. BLH-921013KB
MM Docket No. 92-277
Request for Fee Waiver

Dear Mr. Fischel:

~~CarePhil~~, licensee of Station KKBI (FM), Broken Bow, Oklahoma, by its attorneys, hereby respectfully requests a waiver of the rulemaking fee in connection with the above-referenced matter based upon the following extraordinary circumstances.

CarePhil has been attempting to upgrade the authorization for Station KKBI ever since it acquired the station's license on December 12, 1989. On January 6, 1988, a construction permit, File No. BPH-870901IA, to upgrade the authorization for Station KKBI from Channel 292A to Channel 291C2 was granted to the station's former licensee, Harold E. Cochran. Because of difficulties in finalizing a lease with Weyerhaeuser Company for the proposed upgrade site, Mr. Cochran subsequently filed an application for an automatic downgrade to Channel 291C3 at the station's existing transmitter site, File No. BMPH-890717IK.

Prior to the grant of the Class C3 application, the license for Station KKBI and the Class C2 construction permit were assigned to CarePhil. On December 29, 1989, State Line Broadcasting submitted an Informal Objection with regard to the Class C3 downgrade. Because of the delays in processing the Class C2 application, CarePhil filed an application for extension

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of the Class C2 construction permit (File No. BMPH-900201JQ). CarePhil was later informed that there would be no action on the extension application pending action on the Class C3 application. In May 1990, CarePhil reached a settlement agreement with State Line Broadcasting. On July 23, 1990, CarePhil amended its application pursuant to that agreement, and State Line withdrew its objection.

On January 17, 1992, the Commission granted the Class C3 application. At the same time, the Commission also granted the application for extension of the Class C2 construction permit and provided an additional six months for construction. A copy of that authorization is attached hereto. The grant of these two applications appeared on public notice on January 24, 1992 (Report No. 21300).

During precisely the same time period, however, CarePhil found that it would be able to work out a lease agreement with Weyerhaeuser for the site specified in the Class C2 construction permit after all. Therefore, pending a final lease agreement, CarePhil decided that it no longer wished to pursue the modification to Class C3 but rather would prefer to construct in accordance with the terms of the Class C2 construction permit.

On January 29, 1992, counsel for CarePhil spoke with the Commission's staff and was informed that CarePhil could resolve this matter by simply requesting that the Commission set aside the grant of the C3 construction permit and dismiss the Class C3 modification application. In order to preserve one viable transmitter site at all time, CarePhil could not submit its request to set aside the grant of the Class C3 construction permit until it had received Weyerhaeuser's definite approval of the terms of the proposed lease. CarePhil was unable to receive this approval until near the end of February 1992.

On February 28, 1992, CarePhil informed the Commission by letter that it did not intend to build in accordance with the Class C3 modification but rather to complete construction in accordance with the original Class C2 construction permit (File No. BPH-870901IA). This letter was filed only four days after the 30-day period for filing petitions for reconsideration expired and before the grant became final at the close of business on March 4, 1992. Subsequently, on July 16, 1992, CarePhil filed an application for extension of construction permit (File No. BMPH-920716JZ). As CarePhil had previously notified the Commission that it did not intend to build in accordance with the Class C3 modification, the only file number

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referenced in the extension application was that for the Class C2 construction permit, File No. BPH-870901IA. Likewise, when the Commission granted the extension application on August 28, 1992, the grant listed only the C2 construction permit file number and did not reference any modification of that permit. A copy of that authorization is attached hereto. Further, the Public Notice of the grant listed the extension application as the third request for extension, which could apply only to the Class C2 permit as the application would have been the first request for extension of the Class C3 permit (Report No. 15344, released September 8, 1992).

Thereafter, CarePhil completed construction of the Class C2 facilities, as it had stated it would do, and submitted an application for license to cover construction permit on October 13, 1992. On October 22, 1992, counsel for CarePhil attended a meeting with Commission staff members concerning the license application. At that time, the Commission's staff recognized that it had, in fact, granted extensions of the construction permit to build the Class C2 facility. The Commission's staff also raised a question, however, as to whether CarePhil should have submitted a new petition for rulemaking to return the allotment to Class C2 status at the time of CarePhil's February 28, 1992 letter, since more than 30 days passed before CarePhil informed the Commission of its decision not to go forward with the Class C3 authorization. In order to settle this question, such a petition for rulemaking was filed the next day, October 23, 1992. Additionally, in response to the Commission staff's request, CarePhil filed on October 22 a request for Special Temporary Authority to operate with the Class C2 facilities as constructed. Also on October 22, 1992, the Commission released a Public Notice stating that CarePhil's application for license had been accepted for filing (Report No. 15376).

A Notice of Proposed Rule Making, DA 92-1524, was released on December 1, 1992. No comments other than those of CarePhil were filed. A Report and Order, DA 93-421, again allotting Channel 291C2 to Broken Bow was released on April 28, 1993, effective June 14, 1993.

The Report and Order contained a provision stating that a minor change application for construction permit (Form 301) should be submitted. In view of the unusual procedural status of this case, in that the Class C2 facilities were in fact already built and operational, and a license application was pending, counsel for CarePhil telephoned the Commission's staff during the week of May 10, 1993, to determine whether such an application would actually be necessary. Counsel for CarePhil was informed

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that an application for construction permit would not be necessary, but that CarePhil should submit a letter to the Commission after the Report and Order became final. That letter should state that the allotment of Channel 291C2 in the rulemaking proceeding had become final and request that the pending license application be processed. Counsel for CarePhil was told that at that time processing of the license application would go forward.

On June 9, 1993, CarePhil submitted the requested letter. On August 4, 1993, having heard nothing further, counsel for CarePhil again spoke with the Commission's staff concerning going forward with processing the license application. Counsel for CarePhil was asked to submit another copy of the June 9 letter, as the staff member could not locate a copy. The additional copy was submitted on August 4, 1993.

Subsequently, CarePhil received a letter from Dennis Williams, Chief, FM Branch, dated September 3, 1993, informing CarePhil that it would be required to submit an application for construction permit on Form 301 to implement the upgrade to Class C2 and to submit the appropriate application and rulemaking fees. The Commission took the position that when the Class C3 modification application was granted, operation as a Class C2 station was no longer authorized.

In view of the extraordinary circumstances set forth above and the representations made by the Commission staff to CarePhil, CarePhil believes the Commission's current position to be unwarranted and inequitable. Until it received the Commission's letter of September 3, 1993, the Commission's own actions and statements had led CarePhil to believe that the Class C2 construction permit was still a viable authorization. On January 17, 1992, the Commission not only granted CarePhil's Class C3 modification application but also granted its application for extension of the Class C2 construction permit. Furthermore, on August 28, 1992, after CarePhil had informed the Commission that it intended to construct the Class C2 rather than the Class C3 facilities, the Commission again extended CarePhil's Class C2 construction permit, with no reference whatsoever to the Class C3 modification.

Further, at the October 22, 1992, meeting, the Commission's staff recognized that the Class C2 construction permit had been extended. The only concern raised at that time was whether another rulemaking petition should have been filed so as to alert other possible interested parties. No mention was made of another application for construction permit. Thus, CarePhil was

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again led to believe that the Class C2 construction permit was still viable and that the only possible remaining regulatory difficulties would be resolved with completion of the new rulemaking proceeding. Even after the rulemaking proceeding had been completed, CarePhil was again informed that no further application would be required but that the matter could be resolved by a letter informing the Commission's processing staff of the termination of the rulemaking. Thus, up until the September 3, 1993, letter, the Commission had essentially represented to CarePhil that the Class C2 construction permit was still valid, and CarePhil acted in reliance upon that understanding. Therefore, to now turn around and require CarePhil to file a new application for construction permit and pay the filing fees for both that application and the rulemaking would be grossly inequitable.

Furthermore, the processing of the rulemaking petition did not require any extensive analysis by the Commission. The very same proposal had already been considered and approved in an earlier rulemaking proceeding and in the application for the C2 construction permit. No comments were filed aside from CarePhil's brief comments supporting the proposed reinstatement of the upgrade. Accordingly, the Commission was not required to expend its usual processing resources. Likewise, very little processing of the application for construction permit will be required, as the same proposal has already been approved. Thus, a waiver of the rulemaking fee is warranted.

Finally, if CarePhil were to begin the process of seeking an upgrade today, it could do so using the Commission's one-step procedure. The Commission has specifically clarified that in that case applicants will normally be charged only the filing fee charged for minor change applications. Public Notice, No. 34706, released August 31, 1993. If CarePhil could start fresh today, it could avoid its previous procedural tangle and would be required to pay only the minor change application fee to accomplish its desired upgrade. Since no rulemaking fee would be required at the present time, a waiver of that fee in the highly unusual situation described above would be an equitable solution.

In sum, CarePhil has found itself in a procedural tangle not entirely of its own making. Throughout its attempts to upgrade the KKBI facilities, it has kept the Commission informed as to its plans and actions. CarePhil has acted in reliance upon statements and instructions from the Commission's staff, which it has now been informed were incorrect. If CarePhil could begin the process afresh, it could accomplish its goal with a one-step application and would be required to pay only one fee.

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Therefore, CarePhil respectfully requests that the rulemaking fee with regard to the above-described matter be waived.

Respectfully submitted,

A handwritten signature in cursive script, reading "Anne Goodwin Crump".

Vincent J. Curtis, Jr.
Anne Goodwin Crump
Counsel for
CarePhil Communications

Enclosures

cc: Dennis Williams, Chief, FM Branch (with enclosures) **By Hand**
Mr. Dale Bickel (with enclosures) **By Hand**
Mr. James D. Bradshaw (with enclosures) **By Hand**

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

File No. BMPH-90020

Call Sign KKBI

Modification No.

MODIFICATION OF CONSTRUCTION PERMIT

FM

(Class of station)

CAREPHIL COMMUNICATIONS
617 SOUTH PARK DRIVE
BROKEN BOW, OK 74728

Permittee CAREPHIL COMMUNICATIONS

Station location: BROKEN BOW, OK

Associated Broadcast station:

The Authority Contained in Authorization File No. BPH-870901IA
dated JANUARY 6, 1988 granted to the Permittee listed above is hereby modified in part as follows:

DATE OF REQUIRED COMPLETION OF CONSTRUCTION: 17 JUL 1992

This modification of construction permit shall be attached to and be made a part of the construction permit of this station.

Except as herein expressly modified, the above-mentioned construction permit, subject to all modifications heretofore granted by the Commission, is to continue in full force and effect in accordance with the terms and conditions thereof and for the period therein specified.

Dated: JAN 17 1992

FEDERAL
COMMUNICATIONS
COMMISSION



FCC For
October

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

File No. BPH-920716JZ

Call Sign KKBI

MODIFICATION OF CONSTRUCTION PERMIT

Modification No.

FM

(Class of Station)

CAREPHIL COMMUNICATIONS
617 SOUTH PARK DRIVE
BROKEN BOW, OK 74728

Permittee CAREPHIL COMMUNICATIONS

Station location: BROKEN BOW, OK

Associated Broadcast station:

The Authority Contained in Authorization File No. BPH-870901IA
dated 1-6-88 granted to the Permittee listed above is hereby modified in part as follows:

DATE OF REQUIRED COMPLETION OF CONSTRUCTION: FEB 28 1993

This modification of construction permit shall be attached to and be made a part of the construction permit of this station.

Except as herein expressly modified, the above-mentioned construction permit, subject to all modifications heretofore granted by the Commission, is to continue in full force and effect in accordance with the terms and conditions thereof and for the period therein specified.

Dated **AUG 28 1992**

FEDERAL
COMMUNICATIONS
COMMISSION



FCC Form
October 19